

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE ANIL VERMA

ON THE 27TH MAY, 2024

SECOND APPEAL No. 2186 of 2023

BETWEEN:-

- 1 CHHAYA W/O GOVARDHANSINGH SOLANKI,
AGED 66 YEARS, OCCUPATION: HOUSEWIFE
- 2 GOVARDHANSINGH S/O BHAWARSINGH
SOLANKI, AGED 68 YEARS, OCCUPATION:
RETIRED BANK EMPLOYEE BOTH R/O 81,
HOUSING COLONY, GANDHINAGAR,
MANDSAUR (MADHYA PRADESH)

.....APPELLANTS

(BY SHRI NITIN SINGH BHATI -ADVOCATE)

AND

- 1 PUBLIC AT LARGE
SENIOR ACCOUNTANT OFFICER, PRINCIPLE
CONTROLLER OF DEFENSE ACCOUNTS
(PENSION) DRAUPADI GHAT, ALLAHABAD
(PRAYAGRAJ), U.P. (UTTAR PRADESH)
- 2 VIRENDRASINGH S/O GOVARDHANSINGH
SOLANKI, AGED 38 YEARS
- 3 VIKAS SINGH S/O GOVARDHANSINGH SOLANKI,
AGED 32 YEARS, 81-A, HOUSING COLONY,
GANDHI NAGAR, MANDSAUR (MADHYA
PRADESH)
- 4

...RESPONDENTS

(SHRI HIMANSHU JOSHI ADVOCATE FOR RESPONDENT NO.2)

This appeal coming on for hearing this day, the court passed the following:

JUDGMENT

1. The appellants have preferred the present second appeal under section 100 of Code of Civil Procedure, 1908 (in short CPC) against the impugned judgment and decree dated 25.7.2023 passed by Fifth District Judge Mandasaur in civil appeal no. RCA/123/2023 thereby affirming the judgment and decree dated 7.12.2020 passed by Third Civil Judge Class II District Mandasaur in RCS-A/119/2020 whereby the civil suit filed by appellants for declaration of civil death has been partly allowed.

2 Brief facts of the case are that the appellants/plaintiffs are the parents of Surendra Singh Solanki, who had joined Indian Army in the year 2002 as Soldier and in the year 2010 he was promoted to the post of Signal Man in Srinagar. Surendra Singh took his training from 4.2.2010 to 21.2.2010 at Military Technical Training Institute Goa and was again called by the Center for further military training on 25.7.2010 in Goa. Surendra Singh went for training in Goa, but never returned from there and on 27.7.2010 the Military Training Center Goa informed the appellants that Surendra Singh has not reached at the training center on 25.7.2010. Thereafter appellants have lodged a missing person report at police station Ponda Goa. The appellants started receiving ordinary family pension w.e.f. 25.7.2010 and in the year 2020 they received a communication from department that due to non availability of death certificate of Surendra Singh, Special Family Pension GPR and other arrears could not be paid to them. Thereafter appellants have filed the civil suit for declaration of date of civil death of Surendra Singh.

3 The respondents/defendants No. 3 and 4 filed their written statement before the trial court has supported the appellants claim

except the factum of civil death of Surendra Singh since 25.7.2010.

4 The learned trial court on the basis of aforesaid pleading framed issues and after hearing both the parties and recording evidence has decreed the suit filed by plaintiffs/appellants by declaring civil death of Surendra Singh since 24.6.2020 i.e. the date of institution of civil suit. Being aggrieved by the impugned judgment and decree, the appellants have preferred first appeal, but after re-appreciating the entire evidence, the first appellate court has affirmed the findings of fact, so recorded by the trial court and dismissed the appeal. Hence the appellants have preferred this second appeal.

5 Learned counsel for appellants contended that both the courts below have committed grave error of law in misinterpreting the fact regarding determining the date of death of Surendra Singh as 24.6.2020. The Department of defence has already considered the date of death of Surendra Singh as 25.7.2010 and also granted ordinary family pension to appellants. The same person cannot have two dates of death. Army Court of Inquiry has considered the date of his disappearance since 25.7.2010. Hence it is prayed that appeal be allowed and date of civil death of Surendra Singh be considered as 25.7.2010.

6 Learned counsel for respondent no.2 opposes the prayer, by submitting that the impugned judgments and decree passed by both the courts below are just and proper and does not deserve for any interference.

7 Heard learned counsel for the parties and perused the record of both the courts below with due care.

8 This second appeal was admitted for final hearing vide order dated 2.5.2024 on following substantial questions of law:-

"(i) Whether, the Courts below considering the cause of action i.e. the issuance of letter from respondent No.2 still failed to grant the declaration from the date of deceased son of appellant went missing i.e. 25.07.2010?

(ii) Whether, the Court below committed mistake of fact and law in considering the date of civil death of Surendrasingh Solanki from the date of institution of the suit instead of date he went missing?

(iii) Whether, date of death cannot be presumed and does Section 108 of Evidence Act, 1872 raises only a presumption of death and not a presumption of date of death ?"

These questions of law are interconnected, therefore they are answered simultaneously.

9 Sections 107 and 108 of India Evidence Act, 1872 reads as under:-

Section 107. Burden of proving death of person known to have been alive within thirty years. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Section 108. Burden of proving that a person is alive who has not been heard of for seven years. (Provided that when) the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it.

10 The Hon'ble Apex court in case of **LIC of India Vs. Anuradha**

reported in (2004)10 SCC 131 has held as follows:-

“12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

13 A presumption assists a party in discharging the burden of proof by taking advantage of presumption arising in his favour dispensing with the need of adducing evidence which may or may not be available. Phipson and Elliott have observed in 'Manual of the Law of Evidence' (Eleventh Edition at p.77) that although there is almost invariably a logical connection between basic fact and presumed fact, in the case of most presumptions it is by no means intellectually compelling. In our opinion, a presumption of fact or law which has gained recognition in statute or by successive judicial pronouncements spread over the years cannot be stretched beyond the limits permitted by the statute or beyond the contemplation spelled out from the logic, reason and sense prevailing with the Judges, having written opinions valued as precedents, so as to draw such other inferences as are not contemplated.”

11 The Hon'ble Apex court again in case of **N.Jayalakshmi and others Vs. R. Gopala Pathar and another reported in 1995 Supp(1) SCC 27** has observed as above:-

"If a person is not heard of for seven years there is a presumption of the fact of death at the expiration of seven years, but the exact time of death is not a matter of presumption but of evidence and the onus of proving that death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption that death took place at the close of seven years."

12 Though the provisions of Sections 107 and 108 of Evidence Act are very clear as to the rising of presumption, but these sections do not throw any light upon the date on which a person can be presumed to be dead. In other words, the doubt or dilemma that arises in cases of this nature is as to the date of death of the person in respect of whom the presumption is raised. The moment it is established that a person has not been heard of for 7 years, the presumption of death arises. Although the presumption under the Evidence Act is confined only to the factum of death, but is silent in respect of the actual date of death or presumed death.

13 The Andhra High court vide order dated 31.1.2017 passed in **WP No. 34859 of 2016 in case of Union of India Vs. Polimetla Mary Sarojini** has held as under:-

“ 18 In *Indira Vs. Union of India* 2005(3) KLT 1071, a Single Judge of the Kerala High court held that even though under the Army Act, a person can be said to be a deserter when he is found missing and can also be dismissed for desertion, the

situation changes when the presumption of death of such a person becomes available under Section 108 of the Evidence Act. In other words, if a person is declared a deserter and dismissed from service and is not traced out within seven years, then section 108 of the Evidence Act takes over and all consequences would follow. In other words, presumption of death was held to supersede the finding of desertion.

18. The aforesaid view was reiterated by the division bench of the Bombay High court in Smt. Bhanumati Dayaram Mhatre Vs. Life Insurance Company of India, AIR 2008 Bombay 196, wherein the question for consideration before the Court was as to whether a person would be presumed to have died on the date he went missing or on the date when the period of 7 years expired from the date of his missing. While interpreting the provisions of sections 3, 107 and 108 of Evidence Act in para 4 and 5 of its decision, the High court observed as under:-

“ 4..... Section 108 of the Act is in the nature of exception to the rule contained in Section 107 of the Act and states that when a person has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who asserts that the person is alive. In other words, if a person has not been heard of for a period of more than 7 years by the persons who would naturally have heard of him if he had been alive, then a presumption arises of his death. Though section 108 of the Act raises a presumption of death of a person if he has not been heard of for a period of 7 years by the persons who would naturally have heard of him, it raises no presumption as to the date of his death. The date of his death, if disputed, must be proved as any other fact.

14 The Hon'ble Supreme court in case of N. Jayalakshmi (supra) has held that exact time of death is not a matter of presumption but of evidence and the onus of proving that death lies upon the person who

claims a right to the establishment of which that fact is essential. **(also See Darshan Singh and others Vs. Gujjar Singh AIR 2002 SC 606).**

15 In the instant case except the date of death of Surendra Singh all other facts are not in dispute. Even the Court of Inquiry has considered that Surendra Singh is missing from 25.7.2010 from Puna Railway Station while returning from leave to join his duty. Therefore, the moot question to be decided is only to the date of death of Surendra Singh on the basis of evidence available on record.

16 So far as the evidence available on record is concerned, appellant No.1 Chhaya (PW-1) and appellant No.2 Govardhan Singh (PW-2) both of them categorically deposed in their statement that they are father and mother of Surendra Singh who was posted as Signal man (Wireless) at Srinagar and Surendra Singh received his training from 4.2.2010 to 21.2.2010 at Military Training Center Goa and again called for training on 25.7.2010 at Goa. Surendra Singh again went to Goa but he could not reach at training center on 25.7.2010. Thereafter Military Training Center informed them on 27.10.2010 about missing of Surendra Singh, then they had lodged missing person report at police station Ponda Goa (i.e. Exs. P-1 and P-2). The training center has also lodged missing report in respect of Surendra Singh. Both of them categorically stated that they are receiving ordinary family pension w.e.f. 25.7.2010 as per the order (Ex.P-4) issued by office Principal CDA (Pensions) Allahabad and vide letters (Ex.P-6 and P-7) department informed that due to non availability of death certificate of missing Surendra Singh, special pension GPF and other arrears could not be paid to them.

17 Virendrasingh (PW-3) who happens to be the brother of Surendra Singh categorically stated in his deposition that as per CCTV Footage Surendra Singh was lastly seen at Railway Station Goa. Thereafter they tried to search him everywhere, but they did not find any information about his whereabouts and in that regard time to time several news were published in the various newspapers (Articles A-1 to A-28).

18 If the test of preponderance of probability laid down by Section 3 of the Evidence Act is applied, that is to say a fact is said to be proved if the court considers its existence to be so probable that a prudent man ought, under the circumstances of the particular case, to act upon certain supposition that it exists, then it would have to be held that Surendra Singh has died on 25.7.2010 or soon thereafter. If he was alive after 25.7.2010, there was no reason for him not to contact his immediate family members. It is not the case that Surendra Singh left the house in distress or he was under some disability which prevented him from returning home or even contacting his family members. Nor is it shown that Surendra Singh was missing in such circumstances or could be at such place wherefrom he could not even contact his parents or close family members. Considering the fact that Surendra Singh was not under any distress or disability nor was he in the situation wherefrom he could not contact his family members coupled with the fact that he has not contacted his family members at all since 25.7.2010 and has been declared to be dead by the declaratory decree of the competent court makes me, as man of ordinary prudence believe that Surendra Singh must have died on 25.7.2010 or soon thereafter.

19 There are executive instructions in the form of Government of

Indias decisions issued under Rule 54 of the CCS (Pension) Rules. Since these decisions are issued under the statutory rules, they are binding upon the Departments. One of the decisions of the Government of India could be found in Circular Letter No.4-52/86-Pen., dated 3-3-1989. The circular reads as follows:

Payment of retirement gratuity and family pension to the family, in case an officials whereabouts are not known:-

1. A number of cases are referred to this Department for grant of family pension to the eligible family members of employees who have suddenly disappeared and whose whereabouts are not known. At present, all such cases are considered on merits in this department. In the normal course, unless a period of 7 years has elapsed since the date of disappearance of the employee, he cannot be deemed to be dead and the retirement benefits cannot be paid to the family. This principle is based on Section 108 of the Indian Evidence Act which provides that when the question is whether the main is alive or dead and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

2. The matter has been under consideration of the Government for some time as withholding of the benefits due to the family has been causing a great deal of hardship. It has been decided that (i) when an employee disappears leaving his family, the family can be paid in the first instance the amount of salary due, leave encashment due and the amount of GPF having regard to the nomination made by the employee, (ii) after the elapse of a period of one year, other benefits like retirement or death gratuity/family pension may also be granted to the family subject to the fulfillment of conditions prescribed in the succeeding paragraphs.

3. The above benefits may be sanctioned by the Administrative Ministry Department after observing the following formalities:-

(i) The family must lodge a report with the concerned Police Station and obtain a report that the employee has not been traced after all efforts had been made by the Police.

(ii) An Indemnity Bond should be taken from the nominee/dependents of the employee that all payments will be adjusted against the payments due to the employee in case he appears on the scene and makes any claim.

4. The Head of Office will assess all Government dues outstanding against the Government servant and effect their recovery in accordance with Rule 71 of CCS (Pension) Rules, 1972, and other instructions in force for effecting recovery of Government dues.

5. The family can apply to the Head of the Office of the Government servant for grant of family pension and death/retirement gratuity, after one year from the date of disappearance of the Government servant in accordance with the prescribed procedure for sanction of family pension and death/retirement gratuity. In case the disbursement of death/retirement gratuity is not effected within three months of the date of application, the interest shall be paid at the rates applicable and responsibility for the delay fixed.

NOTE:- The above orders regulate genuine cases of disappearance under normal circumstances and not the cases in which officials disappear after committing frauds, etc. In latter type of cases, the family pension needs to be sanctioned only on the Government employee being acquired by the Court of Law or after the conclusion of the disciplinary proceedings, etc., as the case may be.”

20 In the instant case the Court of Inquiry has already accepted that since 25.7.2010 Army person Surendra Singh was missing and thereafter he became untraceable. Therefore, it is impossible to think that a person can be presumed to be dead from the date on which he went missing. Unless a period of seven years expire from the date of his missing, the very occasion for the raising of the presumption does not arise. The parents were in continuous correspondence with the Military Department/Union of India since 2010, then after receiving the letter (Ex. P-7) they have filed a civil suit before the trial court. The matter

has been under consideration of the government for some time as withholding of the benefits due to the family has been causing a great deal of hardship. Hence the date of filing of the present suit would be considered as date of death of Surendra Singh is contrary to above position of law.

21 Therefore, the finding given by the trial court is not based on any cogent material based upon only an inference drawn for which there was no basis for the aforesaid reasons. In the present case the finding of the both the courts below are erroneous and unsustainable due to lack of proper appreciation of fact and law as indicated above. Hence the appeal deserves to be allowed.

22 In the result, this second appeal is partly succeeds and partly allowed and the impugned judgment and decree passed by the trial court is modified by declaring the date of death of Surendra Singh son of Goverdhan Singh Solanki as 25.7.2010. The appellants are entitled to all the benefits as per aforesaid decision of the Government of India under the circular letter No. 4-52/86-Pen. Dated 3.3.1989. The respondent no. 2 is directed to compute and pay GPF, Gratuity, Family pension and all other retiral benefits to the parents of missing soldier Surendra Singh.

23 Before parting, this Court would like to make an observation that the history of our Indian Army is full of unique tales of courage, sacrifice and martyrdom. The brave soldiers of the Indian Army live for the country and die for the country. But unfortunately when a soldier suddenly goes missing, the Indian Army's behavior towards him

becomes somewhat rude. Instead of helping the family of the missing soldier, the Indian Army expects them to get the date of his civil death declared through civil Court, and they are denied to release the pension and other retirement allowances of the missing soldier. It is a hardship for grieving family of a missing soldier. Although this is done under certain rules, but considering the pride and self respect of the soldier, now these worn out Rules need to be abolished.

(ANIL VERMA)
JUDGE

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